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In the Supreme Court of the United States

OCTOBER TERM, 1979

SIMA PRODUCTS CORPORATION AND
IRWIN DIAMOND, PETITIONERS

v.

DR. JOHN MCLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. On March 5, 1975, the Federal Aviation Administration (FAA) promulgated an amendment to its Rule 121.538a, 14 C.F.R. 121.538a. This amendment, *inter alia*, set forth the duty of airports to warn air travelers about the possible effects of X-ray inspection systems on undeveloped photographic film. The amended regulation states (14 C.F.R. 121.538a(e)):

> No certificate holder [*i.e.*, airport] may use an X-ray system to inspect carry-on baggage or items, unless a sign is posted in a conspicuous place which notifies passengers that such items are being inspected by an X-ray system and advises them to remove all X-ray

and scientific film from their carry-on baggage and items before inspection. If the X-ray system exposes any carry-on baggage or item to more than one milliroentgen during the inspection, the certificate holder shall post a sign which advises passengers to remove film of all kinds from their carry-on baggage and items before inspection. If requested by a passenger, his photographic equipment and film packages shall be physically inspected without exposure to an X-ray system.

This amendment was adopted after notice in the Federal Register (39 Fed. Reg. 22275 (1974)) and after receipt of comments from many sources, including film manufacturers, scientific and technical organizations, *Petersen's Photographic Magazine* and the Aviation Consumer Action Project (Pet. App. 18a). Among those submitting comments were petitioners, who manufacture and distribute lead laminated containers into which a traveler can put undeveloped film to protect it from the effects of X-ray machines. The amended rule was adopted under informal notice-and-comment rulemaking procedures without a full evidentiary hearing. On August 31, 1976, petitioners filed a petition with the FAA requesting it to amend Rule 121.538a(e) to require that airport signs advise travelers that X-ray inspection may affect all types of undeveloped film and that they should therefore remove all film from carry-on baggage (Pet. App. 3a-4a & n.2).

On January 11, 1977, having received no response from the FAA, petitioners filed suit in the United States District Court for the Northern District of Illinois seeking a declaratory judgment that the current version of the rule is void and that the FAA instead should adopt their

proposed amendment (Pet. App. 12a). The district court dismissed the complaint on November 9, 1978 (Pet. App. 12a-22a), holding that exclusive jurisdiction to review the challenged rule lies in the court of appeals under 49 U.S.C. 1486.[1] In affirming the dismissal (Pet. App. 1a-11a; 612 F. 2d 309), the court of appeals relied on a line of recent cases in the District of Columbia Circuit which hold that where the courts of appeals have statutorily conferred jurisdiction to review the "orders" of an administrative agency, they also have exclusive jurisdiction to review that agency's informal rulemaking so long as there is an adequate administrative record. *Investment Company Institute* v. *Board of Governors of Federal Reserve System*, 551 F. 2d 1270 (1977); *Deutsche Lufthansa Aktiengesellschaft* v. *CAB*, 479 F. 2d 912 (1973) (Pet. App. 6a-8a). The court of appeals concluded that as used in 49 U.S.C. 1486, the term "order" means "any agency action capable of review on the basis of the administrative record" (*id.* at 7a). Since the record in this case is adequate for that purpose, the court below held that the court of appeals is the proper forum for petitioners' challenge to the FAA rule (Pet. App. 9a-10a).

2. The decision of the court of appeals is correct. The court carefully examined the question of whether and under what circumstances the courts of appeals have exclusive jurisdiction to review an agency's informal rulemaking under a special review statute. Like 49 U.S.C. 1486, such statutes typically state only that the courts of appeals have exclusive jurisdiction to review agency "orders." As the court below explained (Pet. App. 7a), at one time the D.C. Circuit believed that a regulation promulgated after rulemaking constituted an "order" for

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[1] 49 U.S.C. 1486 is set forth at Pet. 3.

purposes of a special review statute only when a full evidentiary hearing had been held. *United Gas Pipe Line Co.* v. *FPC*, 181 F. 2d 796 (1950). In recent years, the D.C. Circuit has effectively overruled *United Gas Pipe Line*, allowing direct court of appeals' review of informal rulemaking so long as there is sufficient information in the administrative record to permit such review. *Investment Company Institute* v. *Board of Governors, supra*, 551 F. 2d at 1276 ("the general approach taken by *United Gas Pipe Line* is no longer good law in this circuit"); *Deutsche Lufthansa Aktiengesellschaft* v. *CAB, supra*; *Environmental Defense Fund* v. *Hardin*, 428 F. 2d 1093, 1098-1099 (1970).[2] As the court explained in *Investment Company Institute*, since agency rules are only subject to review in the courts upon the administrative record, judicial fact-finding is unnecessary and the unique capacity of the district court to perform that function need not be tapped. Therefore, to permit the district court to exercise jurisdiction over challenges to informal rulemaking would only cause "unnecessary delay and expense * * * and undesirable bifurcation of the reviewing function between the district courts and the courts of appeals * * *" (551 F. 2d at 1276).[3]

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[2]*Lufthansa* involved the same review statute involved here, because 49 U.S.C. 1486 covers both the FAA and the CAB.

[3]Petitioners, citing *PBW Stock Exchange, Inc.* v. *SEC*, 485 F. 2d 718 (3d Cir. 1973), cert. denied, 416 U.S. 969 (1974), claim that there is a conflict between the circuits on the question of whether informal rulemaking constitutes an "order" for purposes of direct review statutes. While *PBW* does reach a different result than do the court below and the cases on which it relies, that result is based primarily on the Third Circuit's reading of the legislative history of a particularly detailed statutory scheme. In *PBW*, a divided panel concluded that in enacting Sections 19(b) and 25(a) of the Securities Exchange Act of 1934, 15 U.S.C 78s(b) and 78y(a), Congress clearly intended that when the SEC elects to proceed by rule rather than order in altering the practices of securities exchanges, direct court of appeals review is unavailable. The court based that conclusion on the fact that Congress had defeated several attempts to make such SEC action judicially reviewable (either by amending Section 19(b) to require that the Commission proceed only by order, by amending other provisions of the Act to require that Commission rules be promulgated by order, or by directly amending Section 25(a) to make Commission rulemaking reviewable). Thus, *PBW* turns on the construction of an atypical review statute with a unique legislative history.

The FAA promulgated the rule challenged here after soliciting and receiving comments from a wide variety of sources, including petitioners (Pet. App. 9a-10a, 16a-19a). This created an adequate record on which to conduct judicial review. Accordingly, exclusive jurisdiction to review the rule lies in the court of appeals, not in the district court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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